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IN THE

Supreme Court of the United States

October Term 1991

LAWRENCE H. CRANDON, THOMAS K. JONES, HAROLD KITSON, JR., MELVYN R. PAISLEY and HERBERT A. REYNOLDS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONERS' REPLY TO THE OPPOSITION OF THE UNITED STATES TO THE PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

Table of Authorities ii

I. Substantial Justification 2

II. Indemnification 7

TABLE OF AUTHORITIES

CASES Page

American Association of Retired Persons v. EEO, 873 F.2d 402, 406 (D.C. Cir. 1989) 8

Anderson v. Bessemer City 470 U.S. 564 (1985) 5

Ardestani v. Immigration & Naturalization Service, 112 S.Ct. 515 ..... 7, 8

In re Davis, 899 F.2d 1136 (11th Cir.) 9

Morales v. Trans World Airlines, Inc., 112 S.Ct. 2031 (1992) 7

Pierce v. Underwood, 487 U.S. 552 (1988) 2, 5

United States v. Monsanto, 491 U.S. 600 (1989) 7

STATUTES

18 U.S.C. § 209(a) ..... *passim*
21 U.S.C. § 853(a) 7

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The government attempts to dissuade the Court from reviewing the decision of the court of appeals on the ground that the lower court's holdings on both issues on which *certiorari* is sought "represent fact-bound applications of the standards articulated by this Court." Opp. at 6. That statement is incorrect. In one instance, involving the applicable standard of review, the court of appeals engaged in a conspicuous and fundamental misconception of its role as defined by this Court. In the other instance, involving the significance of pervasive state indemnification statutes, the court of appeals ignored similarly fundamental principles of statutory construction and

adopted a rule of general application that eliminates a major class of cases from the salutary reach of the EAJA.

I. *Substantial Justification*

1. The government, by endorsing the action of the court of appeals in making an "independent assessment of the strength of the Government's merits position," App. at 11a, 12a, despite the district court's careful review of the issue, seeks to eviscerate the principal holding of *Pierce v. Underwood*, 487 U.S. 552 (1988). In support of its position, the government places great stock in this Court's detailed analysis of the evidence in *Pierce*. Opp. at 5. In that opinion, however, this Court analyzed the meticulous factual review of the district court's decision by the court of appeals simply to demonstrate that the appellate court had not accorded sufficient deference to the trial court's findings on substantial justification. It is precisely that absence of deference, condemned by the Court, which the government now supports. Opp. at 7 n. 9. The lip-service which the court of appeals gave to the deferential review required by *Pierce* is belied by its action substituting its judgment for that of the trial Court. Since the government is a party to every EAJA case, the Court should grant *certiorari* to ensure that the court of appeals and the government fully understand and apply the teaching of *Pierce*.

2. After glossing over the Fourth Circuit's failure to follow the dictates of *Pierce*, the government attempts to justify that court's "independent assessment" that the government's position was substantially justified. Thus, the government suggests that the district court ruled that the absence of prior cases under Section 209(a) alone established lack of substantial justification. The government concludes that this purported ruling constituted an abuse of discretion that warranted reversal by the court of appeals. Opp. at 8. Nowhere, however,

did the district court say that the absence of prior cases "established" lack of substantial justification. *See* App. 28a; *see also* App. 40a-42a. To the contrary, the district court considered that factor along with many others in finding as a fact that the government had not been substantially justified in bringing this case. App. 28a-29a.[1] The government concedes that the district court's consideration of this factor was proper. Opp. at 8.

In contrast to the district court's consideration of numerous relevant factors, the court of appeals, in its "independent assessment," chose to ignore all factors other than the legal weight of the government's case. Although the government lamely asserts that "the court of appeals [did not] limit its inquiry to the legal strength of the government's underlying case" (Opp. at 7), on the very next page the government concedes that in its and the court of appeals' view "the issue here is whether the government's construction of the scope of Section 209(a) was substantially justified." Opp. at 8. As discussed in the Petition for Certiorari, the proper scope of inquiry under EAJA is far broader than the correctness of the government's legal position. Pet. at 22-25.

3. Turning to the strength of the government's legal case, the government attempts without success to support the Fourth Circuit's opinion. The government, like the majority in the court below, engages in revisionist history in discuss-

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[1]The district court also took into account this Court's holding in *Crandon*, the lack of textual support for the government's position, the absence of authoritative legislative history supporting the government's position, the fact that the authoritative legislative history supported the *petitioners*, the government's failure over 50 years to challenge a severance payment under Section 209 (or its predecessors), the government's knowledge of Boeing's severance-pay practice, and the government's prior approval of the payments in this very case. App. 28a-29a, 42a-43a.

ing the role of the rule of lenity in *Crandon*. But as the Petition demonstrates — and as did, indeed, the Court's opinions in *Crandon* and Judge Hall's dissent below — the rule of lenity prohibits the use of inconclusive and marginal legislative history to expand the coverage of a criminal statute beyond its text.[2] This Court in *Crandon* held that the government's construction of Section 209 in this case was just such an impermissible expansion. The district court properly considered this in determining whether the government's position was substantially justified, *i.e.*, in determining whether the government must bear some of the cost for its lawsuit based on its impermissible interpretation of Section 209.[3]

For the same reason, the government cannot find solace in the significance placed by the court of appeals on the review of the legislative history by this Court in *Crandon*. The Court's discussion of the legislative history was required primarily because the court of appeals in its opinion on the merits had adopted the government's unjustified approach to the interpretation of a criminal statute, *i.e.*, reliance on legislative history — and obscure and at best ambiguous legislative history, at that — to expand the coverage of a criminal statute. This Court held that the legislative history relied on by the court of appeals was for the most part irrelevant and, in any event, essentially supportive of petitioners. Again, the district court properly considered this factor in determining substantial justification and again the Fourth Circuit overstepped its bounds by re-analyzing the issue from scratch and weighing it

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[2]Neither Supreme Court opinion stated that Section 209(a) was ambiguous. *See* 494 U.S. at 159 (text "indicates that employment status is an element of the offense"); *id.* at 174-75 ("the only reasonable ***meaning*** of subsection (a) itself is that it applies exclusively to periodic payments").

[3]The government persists in ignoring the significance of the fact that none of the nine Justices of this Court agreed that the government's institution of the action under Section 209(a) had support in either the language or legislative history of the statute. *See* Opp. at 9 n. 11.

differently than the district court. The point of *Pierce* — and the point missed by the court below — is that it is the district court's job to weigh the factors and evidence, and that the court of appeals must affirm so long as the district court's decision is "plausible." *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985).

4. The government struggles to find a basis on which the court of appeals could legitimately have rewritten the district court's factual findings. Thus, in defending the action of the court of appeals, the government states that "[t]here was ample evidence in the record" to support the court of appeals' finding on the intent with which the severance payments were made. Opp. at 10. But the court of appeals reversed a *contrary* finding by the district court and the government simply ignores the far, far greater burden imposed by *Pierce* on a court of appeals when it reverses a trial court's factual finding. Consequently, it was improper for the court of appeals to have made its own findings of fact on the issue of intent and repudiate those of the district court, particularly since the district court had before it considerable evidence including the testimony of witnesses. In addition, the government's argument that the district court was incorrect in finding that petitioners considered the payments to be "normal severance payments," Opp. at 9-10, fails for another reason — the government chooses to deal with the question of *Boeing's* intent and motive rather than petitioners'. Thus, the government refers to how "Boeing chose these individuals for the 'severance' subsidy," Opp. at 10, how the severance payment to each was computed, *id.* at 2, and what was "actually specifically intended by Boeing," *id.* at 10.[4] The record establishes, however, the

[4]Moreover, a reading of the evidence concerning Boeing's alleged motives and intent cited by the government is consistent with a hope expressed by Boeing that the appointments would enhance its reputation in Washington and at NATO rather than directly and immediately further

petitioners did not know how their severance payments were computed. Pet. at 3-4.[5]

5. The government also seeks to re-write other portions of the factual record. Thus, with respect to its decision to bring an action under Section 209(a) to recover the severance payments paid to petitioners, the government makes the remarkable statement, never asserted, much less demonstrated, below, that, "The absence of prior enforcement efforts reflects only the fact that such payments had not previously come to light." Opp. at 11. In fact, the district court found precisely the opposite in its decision on the merits. App. 33a-34a.[6]

"Boeing's commercial interests." *See* Opp. at 10 n. 12. The district court found that Boeing did not intend the severance payments to supplement petitioners' salaries or to compensate them for government service. App. 41a-42a.

[5]The government also asserts that "petitioners all received normal severance payments in addition to the payments challenged by the government in this action." Opp. at 11. As the government is well aware, the so-called "normal severance payments" were not severance payments at all, but simply accrued vacation pay, vested interests in pensions, and the like. JA (1987) 332, 333, 335, 336, 338.

[6]The government asserts that the "lack of similar cases does, moreover, refute petitioners' suggestion (Pet. 11-12) that the issues presented by this case are of broad applicability." Opp. at 11 n. 13. However, the "similar cases" to which the government is obviously referring are cases brought by the government under Section 209(a) involving severance payments. The government's point might be relevant in arguing against having granted *certiorari* in *Crandon* — although, of course, the Court did grant *certiorari* in *Crandon* — but it has absolutely nothing to do with the question of whether the Court should grant *certiorari* in this case to review a court of appeals' reversal of findings of a district court under the EAJA.

II. *Indemnification*

As did the court of appeals, the government simply ignores the most important element in deciding the effect of possible statutory or contractual indemnification on the government's liability under the EAJA — the language of the applicable statute itself. Opp. at 12-14. This Court has forcefully and repeatedly held that the interpretation of a statute must begin with its language. As recently as last Term, the Court so held in *Ardestani v. Immigration & Naturalization Service*, 112 S.Ct. 515, 519-20 (1991), ruling that the word "under" must be given its "plain and ordinary meaning" as it appears in the EAJA. *See also Morales v. Trans World Airlines, Inc.*, 112 S.Ct. 2031, 2036-37 (1992). In the instant case, the government does not dispute that the word "incurred" has only one meaning, the meaning set forth in the petition. The government has not and cannot explain why petitioners did not "incur" fees as that word is commonly defined.

It is true, as stated in *Ardestani*, that plain statutory language can be overcome by legislative history "in 'rare and exceptional circumstances,' . . . when a contrary legislative intent is clearly expressed." 112 S.Ct. at 520 (citations omitted). It is significant, however, that the government in this case — like the court of appeals — cites no legislative history at all. It offers in support of the decision below only its view of the "statutory scheme" and the "purposes of EAJA." Opp. at 12, 13. Thus, the government has nothing with which to rebut the clear language of the EAJA. The government's arguments call forth the language the Court used in *United States v. Monsanto*, 491 U.S. 600 (1989), to reject a claim by the defendants contesting the application of the forfeiture provisions of 21 U.S.C. § 853(a) to attorneys' fees in the face of the clear language of the statute:

> In sum, whatever force there *might* be to respondent's claim for an exemption from forfeiture under § 853(a) of assets necessary to pay attorney's fees—based on his theories about the statute's purpose, or the implications of interpretative canons, or the understandings of individual members of Congress about the statute's scope — "[t]he short answer is that Congress did not write the statute that way."

491 U.S. at 611 (emphasis in original)(citation omitted).

2. Furthermore, the government is wrong in its view of the purposes of the EAJA. Among the primary objectives of that statute is the deterrence of unreasonable governmental action. The Court so observed last Term in *Ardestani*:

> The clearly stated objective of the EAJA is to eliminate financial disincentives for those who would defend against unjustified governmental action and thereby to deter the unreasonable exercise of Government authority.

112 S.Ct. at 521 (citations omitted). The district court's holding furthers this purpose; that of the court of appeals does not.

The government asserts, without citation of authority, that "the question whether a party has incurred fees must be determined at the conclusion of the case." Opp. at 12. That is plainly incorrect. It is at the inception of the case that the eligibility of potential claimants is measured. And it is at the inception of the case that the government's potential liability for fees will deter unreasonable governmental action and induce challenges to such action.[7]

[7]The government cites several decisions that it says are consistent with the decision in this case. Opp. at 13-14. Petitioners have already shown why four of the six cited cases are distinguishable. Pet. at 15-16. The remaining two do not advance the government's position. Unlike *American Association of Retired Persons v. EEOC*, 873 F.2d 402, 406 (D.C. Cir. 1989),

The decision of the court of appeals would relieve the government, which was at fault, of its obligation to pay attorneys' fees, and transfer the burden of its wrongful conduct to petitioners or, alternatively, their former corporate employer and its innocent shareholders. The Court should decide if that result is required under the EAJA because Delaware and other states have chosen to pass a salutary law in order to provide additional incentives to innocent corporate employees, directors, and shareholders to work for corporations.

Respectfully submitted.

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petitioners retained counsel, those counsel were petitioners' counsel of record, petitioners and only petitioners obligated themselves to pay counsel, and Boeing had separate counsel. In *In re Davis*, 899 F.2d 1136, 1144-45 & n.18 (11th Cir.), *cert. denied*, 111 S.Ct. 510 (1990), the applicant for EAJA fees was a bankruptcy estate which the court of appeals stated was "a legal fiction" and "merely a locus of property or monetary value against which the creditors have claims" so could not be "the real party in interest." *Id.* at 1145 n.18.